Many jurisdictions, even those holding that a view is not evidence, give the defendant the right to be present at the view. *Benton* v. *State, supra; People* v. *Bush, supra; People* v. *Thorn, supra.* Unless it can be said that this is due to the policy of the criminal law to allow the defendant every reasonable privilege, it would seem that a degree of protection to the defendant which demands his presence would also demand control of the proceedings by the judge. Many cases, however, allow the right of the defendant to be present to be waived, even by silence, *People* v. *Thorn, supra; State* v. *Adams, supra,* and in such jurisdictions it would seem that the judge's presence might also be waived. See *State* v. *Adams, supra.* In a recent trial for robbery, the jury, without any objection by the defendant at the time, was allowed to view the premises without the judge. Upon their return the defendant excepted. The court held the view to be evidence and, therefore, correctly, that the judge must be present; but that the defendant had waived this right. *People* v. *White* (Cal. 1907) 90 Pac. 471. Under the foregoing analysis this latter holding seems erroneous as does also the additional ground advanced by the Court that the error was cured by a subsequent view had in the presence of the judge.

STATE IMMUNITY FROM SUIT UNDER THE ELEVENTH AMENDMENT.—The United States Supreme Court has rejected the narrow view of what constitutes a suit against a State, laid down by Chief Justice Marshall in *Osborn* v. *The Bank* (1824) 9 Wheat. 738, that a State is not sued unless a party to the record, *New Hampshire etc.* v. *Louisiana* (1882) 108 U. S. 76; *In Re Ayers* (1887) 123 U. S. 443, and has established in its place the rule that a suit against a State is an action in which the adverse interest is in the State, against whom alone relief is asked and judgment will effectively operate. *In Re Ayers, supra; Fitts* v. *McGhee* (1899) 172 U. S. 516. However, since a State can act only through its officers, every act done by them in its behalf, whether upon valid authority or not, affects the interests of the State in a greater or less degree. It is evident, on the other hand, that the mere fact of being a State officer and acting to benefit the State, should not be enough to shield all illegal acts under the doctrine of State immunity from suit. Limits to the doctrine being once recognized, it is natural from the very complexity and extent of the situations arising under State official actions, that the exact limits should be fixed, not by any broad principle supplying a universal criterion, but by a number of narrower rules, each applicable to its special class of cases. *Fitts* v. *McGhee, supra,* 516, 528; *Reagan* v. *Farmers' Loan & Trust Company* (1894) 154 U. S. 362, 390. The best classification of these authorities is based upon the subject matter of the suit: State contracts, torts by State officials, property owned by the State, special financial interests of the State, and suits affecting the discretion of State officers.

The first two classes are well settled. A suit against a State officer, the real purpose of which is to obtain specific performance of the State's contract, is a suit against the State; *Hagood* v. *Southern* (1886) 117 U. S. 52; *North Carolina* v. *Temple* (1890) 134 U. S. 22; *Louisiana* v. *Jumel* (1882) 107 U. S. 711; *In Re Ayers, supra;* but a State officer about to commit a tort under color of an unconstitutional statute is not protected. *Pennoyer* v.

McConnaughy (1891) 140 U. S. 1; *Virginia Coupon Cases* (1885) 114 U. S. 311. Thus a suit to compel an officer to accept bond coupons in payment of taxes, as agreed by the State upon the issue of the bonds, cannot be maintained; *Antoni* v. *Greenhow* (1882) 107 U. S. 769, 783; *North Carolina* v. *Temple, supra;* but an injunction to restrain him from distraining property under an unconstitutional statute may be. The suit may be for money or property in the hands of the defendant unlawfully taken in behalf of the State, *Virginia Coupon Cases, supra,* 270, or for an injunction to prevent such unlawful taking, *Virginia Coupon Cases, supra,* 311, or to enforce a plain ministerial duty resting upon the defendant. *Graham* v. *Folsom* (1906) 200 U. S. 248; *Seibert* v. *Lewis* (1887) 122 U. S. 284. A failure to discriminate clearly between these two classes of cases gave rise to numerous dicta, *Cunningham* v. *Macon etc.* (1883) 109 U. S. 446, 453; *Hagood* v. *Southern, supra;* cf. *Pennoyer* v. *McConnaughy, supra,* 1, 16, 18, which intimated that the division was one between positive and negative relief against an officer. It finally took form in the statement that an officer would not be compelled to do an affirmative act contrary to the supreme power which created him. This rule has no basis in principle; for the latter part appears inapplicable to the cases where the statute is unconstitutional, but even if applicable, would seem to be of equal force whether the statute was positive or negative: the form of relief would seem immaterial. It is submitted that this distinction arose from the accidental circumstance that relief denied under the State contract rule was always positive, while that permitted under the personal tort rule was nearly always negative. The cases of *Graham* v. *Folsom, supra,* and *Seibert* v. *Lewis, supra,* would seem to have necessarily obliterated this erroneous view. In both, affirmative relief was granted compelling disobedience to an unconstitutional statute.

The rule in the property cases is that a suit against a State officer, the real purpose of which is to obtain possession of property to which the State has title and possession, *Cunningham* v. *Macon etc., supra; Christian* v. *N. C. R. R.* (1890) 133 U. S. 233, or to compel the officer to pay money out of the State treasury, *Louisiana* v. *Jumel, supra; Smith* v. *Reeves* (1899) 178 U. S. 436, 439, or to prevent the State from using its own property, *Belknap* v. *Schild* (1895) 161 U. S. 10, is a suit against the State. This principle is so strong that in the last case it overrode the personal tort rule and barred an injunction restraining an officer from using government property made in infringement of a patent. But the courts will not refuse to dispose of property, though the State has some minor interest therein, which comes into their hands in the ordinary course of judicial administration. *Christian* v. *N. C. R. R., supra,* 233, 243.

Certain interests are so peculiarly a State's own that suits involving them are deemed suits against the State. Thus her attorneys, though specially charged, may not be restrained from bringing suits in the name of the State to enforce an unconstitutional statute, when the purpose of the statute is to benefit the State financially, e. g., to raise a revenue. *In Re Ayers, supra; Morenci Copper Co.* v. *Freer* (1903) 127 Fed. 199; cf. *Reagan* v. *Farmers' Loan & Trust Co., supra.* 362, 390. Upon this ground was based a recent Federal decision in which the court refused jurisdiction of a suit by a foreign corporation to restrain the State attorneys of Arkansas from suing

in the State courts to enforce a license tax by penalties, as provided by an alleged unconstitutional statute. The case was correctly distinguished from that class of authorities to which *Reagan* v. *Farmers' Loan & Trust Company, supra,* belongs, where the State attorneys were restrained. In the latter case, the object of the statute was to benefit the shippers through rates established by the commission; in the principal case, to benefit the State in its financial capacity. *Western Union Telephone Co.* v. *Andrews* (1907) 154 Fed. 95.

Another vital interest of the State is in the discretion of her officers. A Federal court will not substitute its discretion for that of a State officer. *Louisiana* v. *Jumel, supra; Fitts* v. *McGhee, supra.* In the Fitts case is made prominent a statement that an officer may be restrained if specially charged by the statute to do the act in question, but not if merely likely to take action because he is a State officer. This principle is used in the case as a means of distinguishing previous cases, but is so incorporated with the personal tort idea as to make its existence as a distinct principle doubtful. It is not within the discretion principle, and is difficult to support. The actual result of the decisions is that a State Board or Commission to establish railroad rates may be restrained from in any way enforcing rates repugnant to the 14th Amendment, including suits by the State Attorney General as a member of the board or as counsel specially charged. *Reagan* v. *Farmers' Loan & Trust Co., supra;* cf. *Smyth* v. *Ames* (1898) 169 U. S. 466; *Prout* v. *Starr* (1903) 188 U. S. 537, 544.

The decisions may be supported on the ground that, the Act being passed for the primary benefit of the shippers, the principle of interference with vital interests of the State is inapplicable, and that the restraint upon suits by the Attorney General is but a means to the end of restraining the board as a whole in every way. If incidental merely, even criminal actions have been restrained. *Cf. Smyth* v. *Ames, supra; Prout* v. *Starr, supra; Cotting* v. *Kansas City etc.* (1901) 183 U. S. 79, 114. But beyond this criminal actions seem to be protected from the Federal Courts, both because of the lack of jurisdiction of equity in this respect and because the vital interest of the State in such proceedings interposes the bar of the Eleventh Amendment.

THE STATUS AND POWERS OF TERRITORIAL CONSTITUTIONAL CONVENTIONS. —The ablest jurists of our early national history seem to have had no doubt that the right of sovereignty vested in the people of the United States. Opinions of Jay, C. J. and Wilson, J. in *Chisholm* v. *Georgia* (1793) 2 Dall. 419, Chas. Pinkney's opinion quoted in 2 Hills at p. 57; John Randolph's opinion, Deb. Va. Conv. of 1829, p. 868; Story, Comm. on the Cons., Book 3, Chap. 3. A denial of this truth was the basis of the States' Rights Movement, Tucker, Lectures on Cons. Law, but the Civil War finally established the former view, which is now generally accepted. Cooley, Cons. Lim. 8; Burgess, Pol. Science & Cons. Law, 143, 145; Jameson, Cons. Conv. 30, 51. The Sovereign has merely delegated the exercise of certain powers to the central and State governments. Among those powers delegated to the central government is the power to govern the territories. Const. of U. S. Article 4, Sec. 3. If the whole sovereignty is in the people of the United